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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE JAMES HOLLYWOOD,

Defendant and Appellant.

2d Crim. No. B222453
(Super. Ct. No. 1014465)
(Santa Barbara County)

Jesse James Hollywood appeals from the judgment entered after his conviction by a jury of first degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and kidnapping. (§ 207.) The jury found true a special circumstance allegation that the murder had been committed while appellant was engaged in the commission of the kidnapping. (§ 190.2, subd. (a)(17)(B). The jury also found true an allegation that a principal in the commission of the murder had been armed with an assault weapon or machine gun. (§ 12022, subd. (a)(2).) The People sought the death penalty, but the jury decided that appellant should be sentenced to life imprisonment without the possibility of parole (LWOP). The trial court imposed a sentence of LWOP for the murder plus three years for the firearm enhancement. The court imposed a determinate term of eight years for the kidnapping.

¹ All statutory references are to the Penal Code unless otherwise stated.

Appellant abducted the victim, but was not present when the victim was killed. The prosecution argued that appellant was guilty of first degree murder based on two alternative theories. One theory was that appellant had aided and abetted a willful, deliberate, and premeditated killing. The other theory was that the killing had been committed during the perpetration of a kidnapping that began when appellant abducted the victim and continued until the victim was killed.

The defense theory was that the kidnapping had ended when the victim consented to remain with the kidnappers. The victim was subsequently killed by Ryan Hoyt, who allegedly acted independently of appellant and without his knowledge. Pursuant to the defense theory, appellant was guilty only of kidnapping.

Appellant makes numerous claims of prejudicial trial court error. In addition, he contends that he was denied the effective assistance of counsel. We affirm.

Facts

Benjamin Markowitz (Ben) was the older brother of the victim, Nicholas Markowitz (Nick). Ben and appellant had known each other since childhood. In 1999 Ben started buying marijuana from appellant. What began as a business relationship developed into a friendship.

In February 2000 the friendship ended when appellant behaved rudely toward Ben's girlfriend. At that time, Ben owed appellant \$1,200. Ben telephoned appellant and said that he was not going to pay him anything. Ben threatened "to beat the shit out of" appellant. Later, Ben broke the windows of appellant's house. Between August 4 and 6, 2000, appellant told Julia Blackford that he hated Ben.

On August 6, 2000, appellant, William Skidmore, and Jesse Rugge were traveling in a van in the West Hills area of the San Fernando Valley. Rugge was driving, and appellant and Skidmore were passengers. They were on their way to Santa Barbara. Appellant testified: "We saw Nick Markowitz walking down the street and I got out of the van and I pinned him up against a tree and I said, 'Where's your brother? Where's your brother?' " Appellant wanted to find Ben and "[b]eat him up." Skidmore punched Nick in the stomach and forced him into the van.

Rugge continued driving to Santa Barbara with passengers Skidmore, appellant, and Nick. Appellant asked Nick where his brother was. Nick replied that he did not know. Appellant told Nick not to "run" and said that Ben "is going to be paying me back my money." Nick was 15 years old.

The van arrived at a townhome in Santa Barbara. Nick was taken to a bedroom. His wrists and ankles were bound together with duct tape. He "had a look of worry on his face." Appellant told Nick that "as soon as they found his brother he would be taken home."

A short time later, appellant's friend, Brian Affronti, "saw [appellant] and Nick hanging out on the couch. Nick was untaped, they were playing video games and smoking bong loads." By "smoking bong loads," Affronti meant that they were "smoking marijuana out of a water pipe." Affronti heard appellant say to Nick, "Oh, dude, don't worry about it. Just tell your parents you were gone for a couple of days, you know."

Richard Hoeflinger, one of the residents of the townhome, spoke to Nick in the living room. Nick said "that he was going to help them find his brother so . . . they could work something out as far as his [brother's] debt." Hoeflinger testified that Nick "was playing video games and drinking . . . Tanqueray, . . . and smoking marijuana, and hanging out just like everybody else at the house." Nick "didn't seem scared." Shauna Vasquez, Hoeflinger's cousin, testified that Nick "said he was going to help them find his brother and then he would be taken home."

Appellant left the townhome, but Rugge remained with Nick. At about 10:00 p.m., Rugge and Nick left the townhome and went to Rugge's house in Santa Barbara.

The next day (August 7) Graham Pressley went to Rugge's house and met Nick. Natasha Adams-Young was also there. They "all just hung out" together, "[s]moked weed in the living room, played video games, [and] ate food." Nick "divulged to [Pressley] that he had been beaten up and thrown into a van and taken to Jesse Rugge's house." Pressley related this information to Adams-Young.

Adams-Young, Pressley, Rugge, and Nick left Rugge's house and drove to Adams-Young's house. At about 2:00 or 3:00 p.m., Rugge left Adams-Young's house. Pressley

and Adams-Young were alone with Nick. Pressley said to him: "You could go. We're not going to keep you here." Adams-Young said, "You could leave at any time. Why don't you go." Nick replied, "If I can do this for my brother, if I can stick this out for my brother, then I will."

Later that same day, Adams-Young drove Pressley and Nick back to Rugge's house. When they arrived, Rugge and appellant were there.

The following day (August 8) appellant met with Stephen Hogg, a criminal defense attorney who was a friend of appellant's family. Appellant told Hogg "that some friends of his had . . . 'snatched' the brother of this fellow that had been harassing him and vandalizing his property." Hogg asked appellant where the victim was located, but appellant did not answer the question. Hogg suggested that they contact law enforcement, but appellant refused. "[A]t the point where [appellant] adamantly refused to go to the police with [Hogg], at that point [Hogg] said to [appellant], 'If your friends hurt this guy, or if your friends ask money for him, they can get life.' "

On the same day that appellant met with Hogg, Adams-Young and Kelly Carpenter drove to Rugge's house. Rugge, Pressley, and Nick were there. Carpenter was aware of Nick's situation. She spoke to Nick and expressed concern. Nick "said that he wasn't worried about it, that this would all be a story that he'd tell his grand kids, that he could take care of himself if he wanted to."

Adams-Young and Pressley walked to a park near Rugge's house. Pressley told Adams-Young that Rugge had said that appellant had offered him \$2,000 to kill Nick. Pressley assured Adams-Young that Rugge would not kill Nick.

Rugge's parents were due to return home from work in the late afternoon. Rugge suggested that the group rent a hotel room where they could party after his parents came home. Rugge reserved a room at the Lemon Tree Inn. Pressley's mother drove the group to the hotel.

The group partied in the hotel room until about 11:00 p.m., when Carpenter and Adams left. Rugge and Pressley remained at the Lemon Tree Inn with Nick.

Later that night, Ryan Hoyt entered the hotel room. Hoyt, a close friend of appellant, was carrying a duffel bag. A gun was inside the bag. Hoyt and Pressley drove to Lizard's Mouth, a popular hiking area in the hills. They walked up a trail to the crest of a hill, where they dug a ditch seven feet long and two feet wide. They then drove back to the Lemon Tree Inn.

Upon arriving at the hotel, Hoyt and Pressley picked up Rugge and Nick. The four of them drove to Lizard's Mouth. They started walking along the same trail that Pressley and Hoyt had taken earlier that night. After about 20 paces, Pressley refused to go any farther because he knew that Rugge and Hoyt were going to kill Nick. Rugge, Hoyt, and Nick continued along the trail without Pressley. About 20 minutes later, Pressley heard a "rapid succession [of] gunfire." After another 20 minutes, Rugge and Hoyt returned to the spot where Pressley was waiting.

Rugge, Hoyt, and Pressley drove back to the Lemon Tree Inn. (16RT 4051-4053) During the drive, Hoyt said to Pressley, "You weren't here, you didn't see anything, if you ever say anything I'll kill you." A few days later, Rugge told Pressley, "Jesse [appellant] had me do the kid." Rugge said that Hoyt had shot Nick.

Before the murder, Hoyt owed money to appellant. Shortly after the murder, Hoyt told Casey Sheehan that his debt to appellant "was clear." Hoyt also told Sheehan that he had killed Nick. Hoyt said that "they'd taken Nick to a secluded area, shot him, and put him in a ditch." Sheehan asked Hoyt why he had killed Nick. Hoyt replied that he had committed the killing "to take care of the boys." Hoyt said that "the boys" were "all of us, his family."

Appellant told Chas Saulsbury that the decision to kill Nick had been made after appellant had consulted his attorney. The attorney said "[t]hat kidnapping carries a [sentence of] life in prison. And that he [appellant] should just find a way to make the situation never happen." Appellant spoke to Rugge and Hoyt about what the attorney had said. Hoyt stated, "I'll do it." Appellant further told Saulsbury that the murder weapon was a "TEC-9" firearm that belonged to appellant. The weapon had been "buried with Nick."

On August 12, 2000, hikers at Lizard's Mouth found Nick's body, which was partially buried in a shallow grave. Nick was lying "on his back with his hands bound behind his back and a piece of duct tape around his head." The cause of death was multiple gunshot wounds.

An "Intratec TEC-9 type firearm" was underneath Nick's body. The firearm was manufactured as a semiautomatic weapon, but it had been converted to a fully automatic weapon.

In his defense, appellant testified that on August 7, 2000, while Nick was at Rugge's house, he had asked Nick, "Do you want to come back to the [San Fernando] Valley with us?" Nick replied, "No, I'm cool." Appellant was "in disbelief and angry" when he learned that Hoyt had shot Nick. Appellant never "request[ed] or order[ed] Hoyt to hurt Nick." Appellant admitted that the murder weapon belonged to him. But he claimed that he had stored it in the garage of Hoyt's grandparent's house.

Adoptive Admissions

Appellant argues that the trial court erroneously admitted as adoptive admissions his responses to two questions asked by Casey Sheehan at a party after Nick's death. We review the trial court's ruling for abuse of discretion. (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

" 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) Under this provision, 'If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' [Citations.] 'For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.' [Citation.] 'When a person

makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

Sheehan's first question was: "What's going on? I hear there was a, you know, a kid grabbed out of Los Angeles, taken to Santa Barbara. Now somebody tells me he might be dead. What's going on?" Appellant responded, "Just don't worry about it."

The trial court did not abuse its discretion in admitting Sheehan's question and appellant's response as an adoptive admission. The court could have reasonably construed Sheehan's question as impliedly accusing appellant of having been involved in the kidnapping. If appellant had not been involved, he would not be expected to know "[w]hat's going on." The court could also have reasonably construed appellant's evasive response as a tacit admission of his involvement in the crime.

Sheehan's second question concerned Nick's brother, Ben. At the party Sheehan asked appellant "if it was true if he offered money for somebody to get Ben." The phrase "to get Ben" meant to "[b]eat him up." Appellant "looked pretty taken aback" by the question and said nothing in response. "He turned around and walked out."

Appellant contends that the trial court erroneously admitted this evidence because "[t]he solicitation of harm to Ben has no relevance to guilt or innocence of the charged offenses, it was simply evidence of bad character." But the trial court could have reasonably concluded that appellant's solicitation of harm to Ben was relevant because it tended to show that his kidnapping of Nick had been motivated by a desire to retaliate against Nick's brother.

*Ineffective Assistance of Counsel: Failure to Object to
Alleged Misstatement of Law during Closing Argument*

Because appellant was not the actual killer of Nick, to prove the felony-murder special circumstance the People had to prove that appellant intended to kill Nick. (CALCRIM No. 703) During closing argument in the guilt phase of the trial, the

prosecutor declared that, to prove the special circumstance, the People "had to prove that [appellant] committed the kidnapping and that he intended to do so [commit the kidnapping]. . . . And that his cohort, Ryan Hoyt, did an act that caused death. . . . And the act causing death and the kidnapping were part of one continuous transaction." Appellant argues that defense counsel was ineffective because he failed to object to the prosecutor's omission of the "intent to kill" element.

The standard for evaluating a claim of ineffective counsel is enunciated in *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674]. "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense." (*Id.*, 466 U.S. at p. 687.) To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Id.*, at p. 688.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.*, at p. 697.)

We need not determine whether defense counsel's performance was deficient because the alleged deficiency could not have prejudiced appellant. The jury was properly instructed on the "intent to kill" element: "If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstance of murder occurring during the commission of a kidnapping to be true." We "presume . . . that the jury followed the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 52 Cal.4th 254, 292.) Moreover, the special circumstance allegation found true by the jury stated that appellant had acted "with the intent to kill."

*Ineffective Assistance of Counsel: Failure to Object to
Alleged Prosecutorial Misconduct During Closing Argument*

Appellant maintains that the prosecutor committed misconduct when he told the jury during the guilt phase closing rebuttal argument that, although appellant "had the

opportunity when he testified to tell us . . . why Hoyt may have done this [killed Nick]," he offered no explanation for Hoyt's conduct. Appellant asserts: "This argument was objectionable, because (1) a defendant has no burden of proving anything; (2) the prosecutor did not ask appellant on cross-examination to explain Hoyt's mental state; and (3) appellant is not a competent witness to Hoyt's mental state." Appellant claims that defense counsel was ineffective because he failed to timely object to the prosecutor's remark.

Counsel's performance was not deficient. The prosecutor's remark was fair comment on appellant's theory that Hoyt had decided to kill Nick on his own initiative without any encouragement from appellant. The prosecutor was merely pointing out that, based on this theory, there was no plausible explanation for Hoyt's decision to kill Nick. " ' ' '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence ' ' ' " (*People v. Stanley* (2006) 39 Cal.4th 913, 951.)

Trial Court's Alleged Prohibition of Proper Defense Closing Argument

Prosecution witness Graham Pressley was 17 years old when Nick was murdered. He was tried as an adult and convicted of second degree murder. But he was sentenced as a juvenile. During guilt phase closing argument, defense counsel said that between Pressley's conviction and sentencing, he had lied to a probation officer in an effort to minimize his role in the murder. The alleged motive for the lie was Pressley's desire to be sentenced as a juvenile instead of as an adult. Counsel told the jury that, with a firearm enhancement, Pressley would have been incarcerated for a minimum of 25 years to life if he had been sentenced as an adult. At this point the prosecutor objected, and the trial court sustained the objection. In the presence of the jury, the court told defense counsel that it was "inappropriate" and "improper" to discuss the punishment that Pressley would have received if he had been sentenced as an adult.

Appellant contends that the trial court prejudicially erred in "prohibiting a defense argument that Pressley had a motive to lie to avoid being sentenced as an adult." (Bold and Capitalization omitted.) But defense counsel was permitted to make this argument.

Counsel told the jury: "[Pressley] obviously wanted to be sentenced under the juvenile way, because for murder you can only be held until you're 25." The prosecutor did not object until defense counsel stated that the minimum adult sentence for murder with a firearm enhancement is 25 years to life.²

Even if the trial court had erred, the error would have been harmless beyond a reasonable doubt. Pressley testified that when he was convicted, he knew that he could be sentenced as an adult or a juvenile. He also knew that, as a juvenile, he could be kept in custody until he was 25 years old. Since Pressley was 19 years old at the time of sentencing, his maximum custody time as a juvenile would have been six years. On the other hand, Pressley knew that, as an adult, he was "looking at a minimum of 18 [years] to life" without "even be[ing] eligible for parole until doing approximately 18 years." Furthermore, Pressley testified that he was "doing everything . . . possible to try to get sentenced under the most lenient sentencing scheme." Thus, irrespective of defense counsel's argument, the jury was aware that when appellant spoke to the probation officer, he was motivated to cast himself in a favorable light so that he would be sentenced as a juvenile.

Appellant argues that, by rebuking defense counsel for discussing the punishment that Pressley would have faced as an adult, the trial court improperly "conveyed to the jury that [counsel] was violating ethical norms." "[B]ecause [appellant] raised no objection below on the grounds asserted in this claim, and did not seek a jury admonition regarding . . . the alleged instance[] of judicial intemperance, he has failed to preserve the issue for appellate review. [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 373.) Even if the issue were properly before us, we would find no judicial misconduct. "[T]he court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is

² The minimum adult sentence is not 25 years to life. The punishment for second degree murder is 15 years to life. (§ 190, subd. (a).) The firearm enhancement adds three years. (§ 12022, subd. (a)(2).) Presskey's total potential adult sentence, therefore was 18 years to life.

allying itself with the prosecution" [citation].' " (*Ibid.*) The trial court's comment that it was "improper" and "inappropriate" for defense counsel to discuss the adult sentence for murder was an isolated incident that did not " ' "discredit the defense or create the impression [the court was] allying itself with the prosecution." ' " (*Ibid.*)

Jury Instructions on the Felony-Murder Rule

I

Pursuant to the felony-murder rule, a killing is first degree murder if committed in the perpetration of kidnapping. (§ 189.) Appellant's defense to felony-murder was that the underlying felony of kidnapping had ended before Hoyt killed Nick. Appellant argues: "[The] kidnapping terminated upon Nick's subsequently-conveyed [actual] consent, or appearance of consent, to remain [in Santa Barbara with the kidnappers]." "Actual consent is consent that is freely and voluntarily given, and which could be characterized as the opposite of submission due to force or fear. . . . Apparent consent means words or conduct by the alleged victim that a reasonable observer would believe to manifest consent, even if the appearance is inconsistent with reality and the victim is not voluntarily consenting."

Appellant contends that the trial court erroneously instructed the jury on when a kidnapping ends. The court instructed: "To establish kidnapping, the People must prove the victim is compelled to obey because he fears harm or injury to himself (or another) from the accused and his apprehension is not unreasonable under the circumstances. [¶] A victim who submits to confinement under the threat of assault is confined for as long as he submits to the threat, even though no assault occurs. *As long as the victim feels compelled to remain confined out of reasonable fear, the confinement continues to exist.*" (Italics added.)

This instruction was entitled, "DURATION/TERMINATION OF KIDNAPPING." Appellant argues that, despite its title, the instruction failed "to convey a defense that if Nick remained in Santa Barbara for reasons *other than* fear of harm to himself or his brother, such as a desire to party with his peers, the kidnapping terminated, and the felony murder rule became unavailable." We disagree. The clear implication of

the instruction is that the kidnapping terminated if, and when, Nick freely and voluntarily consented to remain with the kidnappers. Defense counsel so argued to the jury: ". . . Nick was free to leave. That's a critical element. Because if . . . he's staying there because he wants to for whatever reason, on his own, and it's not a byproduct of being scared, of being beaten or hit or injured, . . . then he's not continually confined. And if there's no continual confinement, kidnap terminates."

Appellant maintains that, based on a theory of apparent consent, the jury should have been instructed that "[a] kidnapping may terminate even when fear remains a factor in the victim's decision making process, if a reasonable person would perceive that the victim was consenting to remain." Instead, based on a theory of actual consent, "[t]he jury was told incorrectly that termination of kidnapping depended exclusively on Nick's inward mental state." Appellant asserts, "In a nutshell, the defense and prosecution in formulating proposed jury instructions reached a consensus, albeit an erroneous one, that Nick's fear was the sole determinant of the continuity of the kidnapping." Appellant argues that, because defense counsel failed to object to this instruction or request an instruction on apparent consent as terminating a kidnapping, he was deprived of his Sixth Amendment right to the effective assistance of counsel.

Defense counsel was not ineffective. The italicized portion of the instruction was taken verbatim from *People v. Martinez* (1984) 150 Cal.App.3d 579, 601: "A defendant, having compelled his victim to remain in one place by means of force and threat, need not continuously repeat the force and threats in order to retain control. *As long as the victim feels compelled to remain confined out of reasonable fear, the confinement continues to exist.* [Citation.]"³ (Italics added.) (See also *Parnell v. Superior Court* (1980) 119 Cal.App.3d 392, 409 [kidnapping continued so long as child victim "remained with [defendant], not of his own free will, but out of fear induced by [defendant]"].)

³ *Martinez* was disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10.)

We recognize that "the defendant's reasonable good faith belief that the victim has voluntarily consented to accompany him constitutes a complete defense to a charge of kidnapping. [Citation.]" (*People v. Isitt* (1976) 55 Cal.App.3d 23, 28; see also instruction on simple kidnapping in CALCRIM No. 1215.) But there is no authority for the proposition that a victim's apparent consent to remain with kidnappers following a violent abduction terminates the offense even though the victim "feels compelled to remain confined out of reasonable fear." The kidnappers can always terminate the kidnapping by releasing the victim to a place of safety. (*People v. Platz* (2006) 136 Cal.App.4th 1091, 1107 ["The instruction properly informed the jury that kidnapping continues until the victim is freed and has reached a place of safety"].)

II

In *People v. Cavitt* (2004) 33 Cal.4th 187, 193, our Supreme Court held as follows: "[T]he felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction."

Pursuant to *Cavitt*, the trial court gave CALCRIM No. 540B on causal relationship. It instructed that the People must prove "[t]here was a logical connection between the act causing the death and the Kidnapping. The connection . . . must involve more than just their occurrence at the same time and place." The trial court gave CALCRIM No. 549 on temporal relationship. It instructed that "the People must prove that the kidnap[ping] and the act causing the death were part of one continuous transaction."

Appellant contends that these instructions were deficient because "the instruction describing a 'logical connection' between kidnapping and murder [did so] in a manner that suggested a proximate cause relationship in lieu of a continuous transaction element." Appellant further contends that it was error to instruct "on the logical

connection concept when, under the evidence, the jury was likely to confuse its substance with a proximate cause, 'but-for-causation' standard." (Italics and some capitalization omitted.) Appellant's contentions are meritless. Pursuant to *Cavitt*, the trial court properly instructed the jury on the requisite causal and temporal relationships.

III

The trial court gave CALCRIM No. 549, which specified seven factors that the jury "may consider" in deciding whether the underlying felony and the act causing death were part of one continuous transaction. Appellant argues that this instruction was misleading because many of the specified factors "bore no relationship to the evidence in this case." The factors were as follows: "1. Whether the felony and the fatal act occurred at the same place; [¶] 2. The time period, if any, between the felony and the fatal act; [¶] 3. Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony; [¶] 4. Whether the fatal act occurred after the felony but while one or more of the perpetrators continued to exercise control over the person who was the target of the felony; [¶] 5. Whether the fatal act occurred while the perpetrator was fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime; [¶] 6. Whether the felony was the direct cause of the death; AND [¶] 7. Whether the death was a natural and probable consequence of the felony."

We need not determine whether, as appellant maintains, some of the specified factors "did not apply." Even if they were inapplicable, the instruction would not have been misleading because it made clear that the factors were not exclusive but were merely examples of the type of factors that the jury could consider. The instruction explained: "It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction." Thus, the inclusion of inapplicable factors could not have constituted reversible error. (See *People v. Cross* (2008) 45 Cal.4th 58, 67 ["giving an irrelevant or inapplicable instruction is generally 'only a technical error which does not constitute ground for reversal' "].)

Appellant asserts that the seventh factor, "Whether the death was a natural and probable consequence of the [underlying] felony," was misleading because "without further definition, the term 'natural and probable consequence' conveys to a lay person a 'but for' standard of causation, which . . . is not the measure of felony murder liability." The seventh factor was not misleading. As discussed above, pursuant to *Cavitt* the jury was correctly instructed on both the causal and temporal relationships required for felony murder.

IV

Appellant faults the trial court for not giving *sua sponte* an instruction "specify[ing] that a particular event, Nick's decision to remain in Santa Barbara for reasons other than fear, terminates the continuity of the transaction." Appellant argues that the trial court should have given an instruction as follows: "If the victim remained in Santa Barbara for reasons other than fear of harm or injury to himself or another, homicide was not part of a continuous transaction for purposes of the felony murder rule."

The proposed instruction is a "pinpoint" instruction. "A pinpoint instruction 'relate[s] particular facts to a legal issue in the case or 'pinpoint[s]' the crux of a defendant's case, such as mistaken identification or alibi.' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 214.) " '[P]inpoint' instructions are not required to be given *sua sponte* and must be given only upon request. [Citations.]" (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.) Since appellant did not request a pinpoint instruction, the trial court was under no duty to give it.

We reject appellant's claim that counsel was ineffective for not requesting a pinpoint instruction. Competent counsel could have reasonably concluded that a pinpoint instruction was unnecessary. The instructions given by the court adequately informed the jury that the continuity of the transaction was broken if Nick freely and voluntarily decided to remain in Santa Barbara. Furthermore, appellant has not shown that the absence of a pinpoint instruction prejudiced his defense.

V

Appellant argues that the "reference to a 'perpetrator' " in CALCRIM No. 540B "is incomprehensible under the facts of the case." (Bold and capitalization omitted.) Appellant asserts, "[W]hen the jury confronted the question of to whom the instructions were referring by the term 'perpetrator,' they could not possibly have reached an accurate conclusion." We disagree. CALCRIM No. 540B provides in relevant part: "The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*." The perpetrator is clearly Hoyt, since he committed the act (shooting Nick) that resulted in the death.

VI

Appellant contends that the felony-murder instructions were erroneous because they "allowed and encouraged the jury to consider [as the underlying felony] a second, distinct kidnapping, that occurred when Nick was taken from the Lemon Tree Inn to Lizard's Mouth [where he was executed]." Appellant continues: "The Lemon Tree kidnapping began after the point at which Nick arguably ceased to remain in Santa Barbara due to force or fear. Reliance on the Lemon Tree kidnapping thus bypassed the only defense that the instructions attempted to convey [i.e., Nick's actual consent to remain in Santa Barbara]." Consequently, there was a "danger that the jury would convict appellant on the basis of the Lemon Tree kidnapping." Appellant argues that this "second kidnapping" could not support a felony-murder theory because it was incidental to the murder. Appellant states: "[B]ecause [pursuant to the instructions] the jury could rely on that Lemon Tree kidnapping, . . . it should have been instructed to determine whether the Lemon Tree kidnapping was incidental to the murder."

The felony-murder special circumstance is inapplicable where the underlying felony is incidental to the murder. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 296. ["[I]f the felony is merely incidental to achieving the murder—the murder being the defendant's primary purpose—then the [felony-murder] special circumstance is not present, but if the defendant has an "independent felonious purpose" (such as burglary or

robbery) and commits the murder to advance that independent purpose, the special circumstance is present' "].) Pursuant to CALCRIM No. 730, the trial court instructed the jury that it could not find the special circumstance to be true if the kidnapping was incidental to the murder: "[I]n order for this special circumstance to be true, the People must prove that the defendant intended to commit kidnapping independent of the killing. If you find that the defendant only intended to commit murder and the commission of the kidnapping was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved." We presume that the jury followed this instruction. (*People v. Gonzales* (2011) 52 Cal.4th 254, 292.)

In view of CALCRIM No. 730, the jury's true finding on the special circumstance allegation shows that it determined the underlying felony to be the kidnapping initially perpetrated by appellant in West Hills, not the alleged "second kidnapping" perpetrated by Hoyt at the Lemon Tree Inn. If Hoyt had perpetrated a "second kidnapping" when he transported appellant to Lizard's Mouth, it would have been incidental to the commission of the murder. Nick was transported there for the sole purpose of killing him. Hoyt and Pressley dug Nick's grave at Lizard's Mouth before transporting him there.

Accordingly, even if the trial court had erred in not instructing the jury to disregard the alleged "second kidnapping" as the underlying felony, the error would have been harmless beyond a reasonable doubt. The lack of prejudice is especially evident since, as appellant notes: "The prosecutor did not ask or imply that the jury should rely on a second kidnapping," and "[t]he defense did not suggest or respond to any second kidnapping theory."

Unanimity Instruction

The trial court instructed the jury that appellant was being prosecuted for first degree murder based on two alternative theories: (1) appellant aided and abetted a willful, deliberate, and premeditated killing; or (2) the killing was committed during the perpetration of a kidnapping. The court further instructed that, so long as the jurors unanimously agreed that appellant had committed first degree murder, they were not required to unanimously agree on the same theory.

Appellant contends that theory unanimity was required because the two theories "were based upon acts that cannot be deemed part of an indivisible transaction." (Bold and capitalization omitted) We need not consider this contention because the true finding on the felony-murder special circumstance allegation shows that the jury unanimously agreed that the killing had been committed during the perpetration of a kidnapping. Any instructional error, therefore, was harmless beyond a reasonable doubt.

Appellant argues that the trial court should have instructed sua sponte that the jury must unanimously agree on the act underlying the felony-murder theory. Appellant maintains that the theory could have been based on either of two discrete acts: the "West Hills" kidnapping initially perpetrated by appellant or the subsequent, "Lemon Tree" kidnapping perpetrated by Hoyt. "In any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. [Citation.] Where it is warranted, the court must give the instruction sua sponte. [Citation.] The omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another. [Citation.]" (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1588-1589.)

We need not determine whether the evidence would have permitted the jury to find two discrete acts of kidnapping: the West Hills kidnapping and the Lemon Tree kidnapping. The prosecutor made it clear that he was relying on one continuous kidnapping that began when Nick was abducted in West Hills on August 6, 2000, and ended when he was shot at Lizard's Mouth three days later. During guilt phase closing argument, the prosecutor told the jury: "[T]he murder occurred during the commission of the perpetration of a kidnapping. And that's why we're discussing this ongoing kidnapping, that it began on the 6th and it didn't end until Nick was executed. And it's that simple." Appellant notes: "The prosecutor . . . did not argue the multiple kidnappings as separate theories. He argued the West Hills abduction and aiding and abetting as separate theories on which the jury need not agree." Thus, the "prosecutor's

statements and arguments were an election for jury unanimity purposes" as to the act of kidnapping underlying the felony-murder theory. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418.)

Even if the trial court had erred in not instructing sua sponte that the jury must unanimously agree on the act underlying the felony-murder theory, the error would have been harmless beyond a reasonable doubt. As previously discussed, the jury's true finding on the special circumstance allegation shows that it unanimously determined the underlying felony to be the West Hills kidnapping. A distinct Lemon Tree kidnapping could not have been the basis for the true finding because such a "second" kidnapping would have been committed for the sole purpose of killing Nick and, therefore, would have been incidental to the commission of the murder.

Instruction on Proximate, Intervening, and Superseding Cause

Appellant contends that, as to the aiding and abetting theory, "the trial court erred by failing to instruct sua sponte on proximate causation . . . and on the defense of an intervening or superseding cause." (Bold and capitalization omitted.) We need not consider this issue because the jury found true the felony-murder special circumstance allegation. The jury, therefore, unanimously agreed that appellant was guilty of first degree murder under a felony-murder theory. Accordingly, any error in instructing the jury on causation as to the aiding and abetting theory was harmless beyond a reasonable doubt.

Instruction on Character Evidence

The trial court gave CALCRIM No. 350 on how the jury should consider evidence that appellant did not have a character trait for violence. The instruction provided in part that "evidence of the defendant's good character may be countered by evidence of his bad character for the same trait." Appellant asserts that this provision should have been omitted "because there was no admissible evidence of a character trait for violence." The contention is forfeited because appellant did not object to the provision. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1348 ["Because the instruction is a correct statement

of the law and defendant did not request different language, he has forfeited his claim that the instruction should have been modified"].)

Even if the contention had been preserved for appeal and the trial court had erred, we would conclude that the error was not prejudicial. "It is error for a court to give an 'abstract' instruction, i.e., 'one which is correct in law but irrelevant[.]' [Citation.] . . . [¶] . . . '[I]n most cases the giving of an abstract instruction is only a technical error which does not constitute ground for reversal.' [Citation.] This is such a case. The jurors here must have understood the instruction in accordance with the common meaning of its plain words, judged it to be mere surplusage, and passed over it without further thought." (*People v. Rowland* (1992) 4 Cal.4th 238, 282.)

Instructions on Accomplice Testimony

The trial court gave CALCRIM No. 335 on accomplice testimony. The instruction provided that Graham Pressley, Jesse Ruge, and William Skidmore were accomplices, and "[y]ou may not convict the defendant of any charges based on the statement or testimony of an accomplice alone." The court also gave CALCRIM No. 301, which provided: "Except for the testimony of Graham Pressley, which requires supporting evidence, the testimony of only one witness can prove any fact." Appellant argues that because CALCRIM No. 301 did not mention Ruge, "the instructions as a whole could have misled the jury to exempt Ruge's very damaging hearsay statement(s) from the rule that a conviction may not rest on accomplice testimony alone."

Ruge did not testify at trial. Pressley testified that Ruge had said that appellant had offered him \$2,000 to kill Nick. (16RT 3987) Pressley further testified that Ruge had said, "Jesse [appellant] had me do the kid."

If appellant believed that CALCRIM Nos. 301 and 335 were misleading when given together, he should have requested that they be clarified: "These instructions correctly stated the law; if [appellant] wanted additional, clarifying instructions, he should have requested them." (*People v. Hart* (1999) 20 Cal.4th 546, 622.) "Because the instruction[s are] a correct statement of the law and [appellant] did not request different

language, he has forfeited his claim that the instruction[s] should have been modified." (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1348.)

Even if appellant's claim of instructional error had not been forfeited, the claim would be without merit. CALCRIM No. 301 applies only to "testimony." Because Ruge did not testify, the trial court could not have modified the instruction to provide, "Except for the *testimony* of Graham Pressley [and Jesse Ruge], which requires supporting evidence, the *testimony* of only one witness can prove any fact." (Emphasis added.) CALCRIM No. 335 adequately informed the jury that it could not convict appellant based solely on the nontestimonial, out-of-court statements of Ruge.

Instruction on Other Participants in Commission of Crime

The trial court gave a modified version of CALCRIM No. 373: "The evidence shows that other persons may have been involved in the commission of the crimes charged against the defendant. Your duty is to decide whether the defendant on trial here committed the crimes charged." Appellant argues that this instruction was erroneous because it impliedly directed the jury "not [to] consider the guilt or innocence of other participants" in the commission of the crime. (Bold and Capitalization omitted.)

Appellant notes that he did not object to the instruction. (AOB 228) By failing to object, appellant forfeited his claim of error. (*People v. Moore* (2011) 51 Cal.4th 1104, 1134.) In any event, the instruction accurately stated the law and was not misleading. (See *People v. Farmer* (1989) 47 Cal.3d 888, 918-919, [Supreme Court approved instruction that "told the jury explicitly that its sole duty is to decide whether this defendant is guilty and that there are many reasons why someone who also appears to have been involved might not be a codefendant in this particular trial."] disapproved on other another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

Jury Misconduct

As to the felony-murder special circumstance, the jury found true an allegation that appellant had intended to kill Nick. In a motion for new trial, appellant claimed that the jury had committed misconduct because it had failed "to properly consider, or even discuss, let alone make a unanimous finding" on the intent issue. The claim was

supported by the following declaration from juror no. 3: "[T]he jurors never discussed [appellant's] intent to kill the victim and . . . never decided beyond a reasonable doubt that [appellant] had intended to kill the victim for purposes of finding true the felony murder special circumstance. It was not a question of interpreting the evidence and arguing about [appellant's] intent to kill; but a fact that the jurors never considered as instructed the element of [appellant's] intent to kill required for the special circumstance finding."

The trial court rejected the misconduct claim without conducting an evidentiary hearing. Appellant argues that he was "deprived of his Sixth Amendment right to an impartial jury by the trial court's refusal to allow a post-verdict inquiry into a claim that the jury never deliberated on the issue of intent to kill." (Bold and capitalization omitted.) Appellant also argues that the trial court abused its discretion in refusing to conduct an evidentiary hearing or grant a new trial.

"The trial court is vested with broad discretion to act upon a motion for new trial. [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) The court may grant a new trial "[w]hen the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented." (§ 1181, subd. 3.) "The trial court has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. [Citation.] 'Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is "necessary to resolve material, disputed issues of fact." [Citation.] "The hearing . . . should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred." ' . . . The trial court's decision whether to conduct an evidentiary hearing on the issue of juror misconduct will be reversed only if the defendant can demonstrate an abuse of discretion. [Citations.]" (*People v. Dykes, supra*, 46 Cal.4th at pp. 809-810, fn. omitted.)

" '[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes" ' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

" 'The only improper influences that may be proved . . . to impeach a verdict . . . are those open to sight, hearing, and the other senses and thus subject to corroboration.'

[Citations.]" (*Ibid.*)

Juror no. 3's claims that the jury "never considered" the intent to kill element and "never decided beyond a reasonable doubt" that appellant had the requisite intent "come squarely within the prohibition against impeaching a verdict with evidence of the jurors' mental processes." (*People v. Steele, supra*, 27 Cal.4th at p. 1261.) The only basis for impeaching the verdict was juror no. 3's claim that the jury had "never discussed [appellant's] intent to kill the victim." The trial court did not abuse its discretion in determining that this claim did not warrant the conducting of an evidentiary hearing or the granting of a new trial. Appellant has cited no authority for the proposition that the jurors were required to expressly discuss this issue. The jurors could have decided that no discussion was necessary because an intent to kill was obvious. For the same reasons that the trial did not abuse its discretion, appellant's constitutional rights were not violated.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Brian E. Hill, Judge
Superior Court County of Santa Barbara

Ralph H. Goldsen, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D.
Matthews, Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney
General, for Plaintiff and Respondent.